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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ABEL GARCIA,

Defendant and Appellant.

B215817

(Los Angeles County
Super. Ct. No. VA106794)

THE COURT:*

Abel Garcia appeals from the judgment entered following his negotiated plea of no contest to second degree robbery in violation of Penal Code section 211.¹ Appellant admitted that he had previously suffered a prior strike conviction within the meaning of sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d); that he had served four prior prison terms within the meaning of section 667.5, subdivision (b); and that he had suffered a prior serious felony conviction within the meaning of section 667, subdivision (a)(1). In exchange, the People moved to dismiss

* BOREN, P. J., DOI TODD, J., ASHMANN-GERST, J.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

count 2, assault by means likely to cause great bodily injury (§ 245, subd. (a)(1)) and the allegations as to counts 1 and 2 that he personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a). The People also moved to dismiss allegations as to count 2 that appellant suffered prior convictions within the meaning of sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i) and that appellant suffered a prior serious felony conviction within the meaning of section 667, subdivision (a)(1). Appellant was sentenced to a stipulated term of nine years consisting of: four years for the robbery (the low term of two years, doubled) and five years for the prior serious felony enhancement (§ 667, subd. (a)(1)). We appointed counsel to represent him on this appeal.

The facts giving rise to the robbery conviction are as follows: on November 18, 2007, appellant followed Adolfo Gaska Rojas (Rojas) who had just purchased cigars from a market and was carrying them in his hand. Appellant approached Rojas from behind. Appellant cursed at Rojas and demanded money. When Rojas refused to give him money, appellant punched him twice in the face, and Rojas fell to the ground. Appellant kicked Rojas in the face and head as he lay on the ground. Two witnesses noticed appellant hitting and kicking Rojas, who had dropped his cigars. They stopped their vehicle in front of appellant and called the police. Appellant grabbed the cigars, lit one, started smoking, and walked quickly away. The witnesses followed appellant and identified him as the assailant to the police. Rojas and one of the witnesses identified appellant as the assailant at the preliminary hearing.

Appellant made a motion to dismiss his prior conviction of negligently discharging a firearm in violation of section 246.3 on the basis that it was not an enumerated serious felony under section 1192.7, subdivision (c) and did not qualify as a serious felony pursuant to section 1192.7, subdivision (c)(8) because there was no evidence that he personally used a firearm as required under that subdivision. The trial court denied the motion to dismiss, finding that the record showed that appellant was identified as the shooter at the preliminary hearing in the prior section 246.3 violation and that he admitted personal use of the firearm during argument on the motion to dismiss.

Appellant then pled no contest to the charge of second degree robbery and admitted the prior strike and prior serious felony conviction.

On April 15, 2009, appellant filed a notice of appeal. After examination of the record, counsel filed an “Opening Brief” in which no issues were raised. On October 28, 2009, we advised appellant that he had 30 days within which to personally submit any contentions or issues which he wished us to consider. On November 23, 2009, appellant filed a supplemental brief, and on November 30, 2009, appellant filed a second supplemental brief.

In his November 23, 2009 supplemental brief, appellant argued that the trial court erred in denying his motion to dismiss the prior strike. Pursuant to section 1237.5 and California Rules of Court, rule 8.304(b), a defendant may not appeal from a judgment of conviction upon a plea of guilty unless the defendant has applied to the trial court for, and the trial court has executed and filed a certificate of probable cause for such appeal. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1094-1095.) Issues that may be raised on appeal following a guilty or nolo plea without a certificate of probable cause are those that arose after entry of the plea and do not affect the plea’s validity and issues involving a search or seizure, the validity of which was contested pursuant to section 1538.5. (*People v. Sturns* (2000) 77 Cal.App.4th 1382 (*Sturns*), disapproved on another ground in *In re Chavez* (2003) 30 Cal.4th 643, 657, fn. 6.)

Appellant has failed to obtain a certificate of probable cause as required pursuant to section 1237.5. “[A] challenge attacking an integral part of the plea is, in substance, ‘a challenge to the validity of the plea, which requires compliance with the probable cause certificate requirements of section 1237.5 and [California Rules of Court, rule 8.304(b).]’” (*Sturns, supra*, 77 Cal.App.4th at p. 1390.) In *Sturns, supra*, 77 Cal.App.4th at page 1390, the court noted that in exchange for defendant’s plea of nolo contendere and his admission of a prior strike conviction within the meaning of section 1170.12, subdivision (c)(1), the People agreed to dismiss the other special allegations set forth in the information. The court held that the defendant’s challenge to a trial court’s denial of a motion to dismiss a prior section 451 conviction on the basis of whether the prior

conviction constituted a strike within the meaning of section 1170.12, was an attack on an element of his plea agreement. (*Sturns, supra*, at p. 1390.) Thus, the defendant's failure to obtain a certificate of probable cause precluded review. (*Ibid.*) Similarly, here, appellant's argument that his prior strike conviction under section 246.3 did not qualify as a serious felony pursuant to section 1192.7, subdivision (c)(8) is not cognizable on appeal because it is an attack on an element of his plea agreement for which he failed to obtain a certificate of probable cause.

Appellant's further argument that he was coerced into entering into the plea agreement and admitting a prior strike also challenges the validity of the plea and is similarly not cognizable on appeal because he failed to obtain a certificate of probable cause. (*People v. McEwan* (2007) 147 Cal.App.4th 173, 178 [under statute requiring certificate of probable cause for appeal following guilty or nolo plea that raises issues going to validity of plea, certificate must be obtained when defendant claims that plea was induced by misrepresentations of fundamental nature, that plea was entered at time when defendant was mentally incompetent, or that warnings regarding effect of guilty plea on right to appeal were inadequate].)

Appellant's second supplemental brief complains that his trial counsel and appellate counsel provided ineffective assistance of counsel and that he was coerced into entering the plea of no contest. To the extent that appellant claims he was coerced into entering a plea of no contest based on ineffective assistance of counsel, and lack of mental capacity, he has failed to obtain a certificate of probable cause and his appeal is not cognizable.

Even were we to treat appellant's claims of ineffective assistance of counsel as a petition for writ of habeas corpus, we conclude that appellant's claims are not supported by the record. He claims that his counsel lied to him, failed to conduct investigation or interview witnesses, failed to file a number of motions (including a section 995 motion to dismiss, a motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, a motion to "move courtroom"), and failed to request a psychiatric examination. Yet, appellant does not indicate what evidence or witnesses were necessary to his defense that he did

not commit the robbery. Nor does the record show that a *Pitchess* motion was at issue or that appellant requested or needed a psychiatric examination. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267 [an appellate court should not find ineffective assistance of counsel unless all relevant facts are developed in the record].)

We have examined the entire record and are satisfied that appellant's attorney has fully complied with his responsibilities and that no arguable issues exist. (*People v. Wende* (1979) 25 Cal.3d 436, 441.)

The judgment is affirmed.

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